

## HUMAN SERVICES BOARD

# INTRODUCTION

## FINDINGS OF FACT

2. The petitioner is designated as a specialized service provider for children who need a heightened level of supervision due to their special needs. The petitioner

provides care for approximately 22 children under this program.

3. The regulations call for a staffing ratio of 1 staff member to 10 children. The petitioner's staffing ratio is no more than 1:7.

4. The petitioner has a reputation as a well-run program.

5. J.F. is a licensing field specialist for the Department. She has worked for the Department for seventeen years and has been in her present position for approximately six years. As a licensing field specialist, she has inspected the petitioner three times over six years.

6. W.L. is the petitioner's director. W.L. has worked for petitioner for nineteen years; she has been director for the past six years.

7. J.F. made an unscheduled visit to petitioner on April 6, 2009. J.F. was responding to a report that W.L.

made in March 2009 regarding an incident with two preschool children.<sup>1</sup>

8. Petitioner was short-staffed for part of April 6, 2009. W.L. planned to watch spaces 4 and 5 from 1:30 to 2:15 p.m.

9. The issue involves supervision of nappers in the spaces designated 3, 4, and 5. A sketch (Hearing Exhibit 5) of the preschool area is attached for reference.

10. J.F. arrived for her site visit at approximately 1:25 p.m. and stayed for about one hour. J.F. and W.L. spoke in W.L.'s office for about a half hour before going into the facility to see the space referenced in W.L.'s report. They returned to W.L.'s office to speak.

W.L. did not tell J.F. that she planned to watch spaces 4 and 5. W.L. testified that she did not want to speak about the March 2009 incident where children and staff could overhear the conversation.

11. J.F. wanted to see space 3 where the March 2009 incident occurred. J.F. and W.L. proceeded through the

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<sup>1</sup> A staff member observed two children, aged 3 to 4 years old, go into the bathroom. The staff member followed the children who said they were playing the "penis game". The incident was duly reported by the petitioner. The Department did not find any violations by the petitioner.

preschool program. They went through space 6. The assistant director was in space 6.

12. Spaces 3, 4 and 5 were being used as nap rooms. There are two ways to enter space 3. There is a dutch door off a hallway from space 6. The other entry is through space 2. There is a see-through Plexiglas half wall with a knee gate between spaces 2 and 3 as well as spaces 2 and 1. Spaces 1, 2, and 3 comprise one large room that has been divided into three distinct areas.

There is a hallway between spaces 3 and 4. The entry to space 4 and space 5 is from the hallway abutting space 6. There is a doorway into space 4 from space 6 as well as a doorway into space 5 from space 6. There is a large interior opening between spaces 4 and 5.

13. At this time, there were three staff members in space 1 with children. In terms of space 2, two different staff members went in and out of the room. One staff member came in with a child who went into the loft at the end of space 2 near space 1.

There were nappers in spaces 3, 4 and 5. None of the nappers woke while J.F. and W.L. were there.

14. J.F. testified they went into space 2 and then space 3. J.F. testified that a staff person in space 6

opened the top half of the dutch door to space 3 and looked at the sleeping children. The staff member reopened the top half of the door a couple times more and looked over the top at the sleeping children. J.F. estimated that a little more than a minute passed between the times that the staff member opened the top half of the dutch door and looked inside space 3. J.F. testified that the staff member then opened the top of the dutch door, kept it open and checked on the children more frequently than when she opened and closed the top of the dutch door.

15. J.F. testified that staff members knew the whereabouts and activities of children in space 3. She testified that she did not consider the checking of the napping children approximately every minute to be visual supervision because there were gaps in time.

16. J.F. testified that she and W.L. went back into space 6. They were discussing napping and she looked into space 4 where children were napping and then walked to the doorway to space 5 from space 6 and saw children napping. J.F. did see the interior doorway between the two spaces. She did not see a staff member inside spaces 4 and 5 supervising the children. J.F. testified that the napping

children in spaces 4 and 5 were not being visually supervised.

17. W.L. testified that the staff member in space 6 made adaptations to provide coverage to spaces 3, 4, and 5. W.L. confirmed that the staff member in space 6 checked on the children in space 3 by opening the top half of the dutch door approximately every minute and leaning in and that the staff member then opened the door and would lean in approximately every minute to visually scan the children. W.L. testified that she saw the staff members in spaces 1 and 2 scan the children napping in space 3.

18. W.L. testified that the staff person in space 6 opened the doors from space 6 to spaces 4 and 5 and would step to the doorways every minute and visually scan the sleeping children and then scan the awake children in space 6.

19. Based on her observations, W.L. believed that the staff members had knowledge about the activities and whereabouts of the napping children and would be able to intervene if necessary.

20. J.F. and W.L. spoke about visual supervision at the conclusion of the April 6, 2009 site visit. J.F. and W.L. have different memories of their conversation.

J.F. did not remember whether she told W.L. that there was a program violation.<sup>2</sup> W.L. was under the impression that J.F. was going to ask for guidance from her supervisor whether a program violation existed.

W.L. was left with the impression that visual supervision meant eyes on the child at all times and that this was a change in interpretation of the regulation. She did seek further clarification after the site visit.

21. At hearing, J.F. was questioned as to the meaning of visual supervision. She was given certain situations such as children in opposite areas of a room and a staff member facing in one direction. J.F. testified that such a situation may or may not be a violation.

Further questioning brought out that the key criteria for supervision include a staff member knowing where the children are, knowing what the children are doing, and being able to intervene when necessary.

ORDER

The Department's decision is reversed.

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<sup>2</sup>Typically, the licensing field specialists inform the facility at the end of the site visit about violations and observations.

REASONS

The CDD has promulgated regulations governing the operation of Early Childhood Programs to ensure the quality of care for children and the protection of children. The CDD is basing the violation on Regulation I.D.1 which states:

Each child shall be visually supervised at all times in person by staff (except sleeping infants who are subject to in-person checks every 15 minutes—see V.D.3). Children must be visually supervised while napping/resting.

The petitioner points out that the term “visual supervision” is not defined in the regulations and argues that Regulation I.D.1 should be read in pari materia with the definition of “supervision” and the regulations governing “naps and resting”. The Board agrees that to give meaning to the particular regulation cited above, it must be read in pari materia with the other regulations dealing with supervision.

“Supervision of children” is defined as:

The knowledge of and accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm.

The regulations for “naps and resting” are found at Regulation V.D. The only regulation addressing this situation is Regulation V.D.10 stating “Children



napping/resting not in cribs shall be supervised by a staff person present."

The petitioner argues that the staffing ratios of 1:10 incorporate a common sense awareness that supervision is based upon knowing where children are and what they are doing, not on undivided visual attention for each individual child. In testimony, the Department's witness acknowledged the importance of knowing where a child is, what the child is doing, and being able to intervene, if needed, on behalf of a child.

In licensing violation cases, the Department has the burden of proof to show by a preponderance of evidence that a facility's action rise to the level of a license violation.

In terms of the napping children in space 3, there is recognition by the Department's witness that a staff member was aware of where the children were, aware of the children's activity, and able to intervene. As a result, the petitioner's actions do not rise to the level of a violation.

In terms of spaces 4 and 5, there is conflicting testimony. A staff member was not in those spaces, but the staff member in space 6 was visually monitoring those children on a frequent basis. The Department has not met its burden in terms of these spaces.

The key is the ability for staff to intervene because staff is aware of what the children are doing and where they are. The key is not eyes on each child at all times; a standard that is impossible to meet without 1:1 staffing. Staff members are not static; their responsibility is to monitor by watching and moving.

The Department has not sustained its burden of proof of showing that a violation has occurred. Accordingly, the Department's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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